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IN THE

# Supreme Court of the United States

OCTOBER TERM—1957

No. 886

STERLING DRUG INC.,
*Petitioner,*

*v.*

FARBENFABRIKEN BAYER A. G.,
*Respondent.*

## PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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May 12, 1958.

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## PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The issue presented by this case is the right of Farben to enlist the aid of American courts in enforcing claims* which were admittedly subject to vesting during World War II by the United States Alien Property Custodian, though never actually vested. It is Sterling's position that Farben, a German corporation, is still an enemy alien with respect to these claims, and therefore has no right of access to courts in this country to bring suit upon them.

To sustain its position, Sterling relies on the terms of Congressional Joint Resolution 289, October 19, 1951, 65 Stat. 451, 50 U.S.C. App. notes prec. § 1 (1957). After declaring the termination of the war with Germany, the Joint Resolution expressly preserved, by way of proviso,

* These claims are founded on a contract which even Farben has conceded in earlier proceedings is illegal under the anti-trust laws.

the wartime *status quo* of enemy nationals and others with respect to German property which was either vested or was subject to vesting prior to January 1, 1947, by stating:

> "Nothing herein and nothing in such proclamation [by the President] shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

## Erroneous Construction of Joint Resolution 289

Farben, in its brief, appears to concede by silence that the result reached by the court below is patently inconsistent with the plain meaning of the Joint Resolution. There is only one sentence in Farben's brief which attempts to justify, on the ground that the Joint Resolution was correctly construed, the result reached by the court below. This one-sentence argument is that "the joint resolution [sic] was not intended to permit a wrongdoer to appropriate and confiscate unvested property of Germans after the vesting program had ended" (Br. pp. 11-12).

The short answer to this argument is that of course the Joint Resolution was not so intended, nor has petitioner ever argued that the Joint Resolution should be so construed. Any wrongful appropriation after the vesting program had ended would give rise to a cause of action, and the cause of action would not be "any property or interest which prior to January 1, 1947, was subject to vesting or seizure". Such a cause of action would plainly, therefore, *not* be within the terms of the Joint Resolution and any German whose property had been so appropriated would be free to sue, *Farbenfabriken Bayer A. G. v. Sterling Drug Inc.*, 148 F. Supp. 738 (D.N.J. 1957).

## Effort to Minimize Public Importance of Error Committed Below

The main thrust of Farben's brief is that the decision below construing the Joint Resolution has no public importance because it has no effect upon those assets which were actually vested prior to January 1, 1947—instead, argues Farben, the only impact of that decision is upon those assets which, although subject to vesting on that date, were not actually vested (Br. pp. 8-10).

This argument defies the language of the Joint Resolution. That language makes no distinction whatsoever between these two types of property. Both types of property are treated alike:

> "PROVIDED, HOWEVER, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, *any property or interest which prior to January 1, 1947, was subject to vesting or seizure* under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, *or which has heretofore been vested or seized under that Act*, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued."*

Farben purports to find support for its contention that the decision below will have no effect upon vested property in the argument that the doctrine of governmental immunity will prevent suits in respect of property which was actually vested, even if the decision below is allowed to stand.

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* Emphasis supplied throughout.

This argument misconceives what Congress did in the Trading With the Enemy Act.* Under Section 9(a) of that statute, the United States has waived its sovereign immunity from suits to establish title to vested property—subject only to one exception. That one exception is that a disqualification to bring such suits attaches to one who is an "enemy" or "ally of enemy" with respect to the property to which he seeks to establish title.

The effect of the decision by the court below is that despite the language of the proviso to the Joint Resolution, one who would otherwise be an enemy "with respect to any property or interest" vested or subject to vesting on January 1, 1947 no longer has that status in the sense of disqualification to sue. Thus, the decision below removes the only barrier to suits under Section 9(a) by German nationals.**

The decision in *Swiss National Insurance Co. v. Miller*, 267 U. S. 42 (1925), far from supporting Farben's argument that the decision below has no public importance, instead really represents another decision with which the result reached by the court below is squarely in conflict.

Farben further argues that the decision below could have no effect upon the assets of enemy aliens which were actually vested because of a "specific statutory ban

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*40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1952), as subsequently amended, 50 U.S.C.A. App. §§ 6(b), 9, 20, 32, 33, 39 (Supp. 1957).

**By letter dated May 5, 1958, the Chief, Litigation Section, Office of Alien Property, Department of Justice, requested a copy of the Petition for Certiorari herein. A copy was transmitted by petitioner's counsel pursuant to this request by letter dated May 7, 1958. It is respectfully submitted that if this Court should not be disposed to grant the Petition on the basis of the papers filed by the petitioner alone, the Court should not decide this matter until a reasonable opportunity has been afforded the Department of Justice to decide whether to file an *amicus* brief in support of the Petition for Certiorari because of the implications and effect of the decision below upon the administration of vested enemy property.

against return of vested property to German nationals" (Br. pp. 9-10). This prohibition is found only in Section 39 of the Act. However, Section 39 has been expressly held by this Court to be inapplicable to a Section 9(a) suit, *Guessefeldt* v. *McGrath*, 342 U. S. 308 (1952); *Kaku Nagano* v. *McGrath*, 187 F.2d 759 (7th Cir. 1951) *aff'd*, 342 U. S. 802 (1952). Accordingly it would not prevent the recovery by German nationals of vested property if the decision below is allowed to stand.

## The Desirability of Review Is Emphasized by Farben

In urging the correctness of the decision below, Farben relies primarily upon the argument that "even if the continued right to vest property on the part of the Government after October 19, 1951 [the adoption of the Joint Resolution] prohibited litigation by German nationals, that right of seizure has long since been terminated" (Br. p. 12). Reference is then made to a series of events occurring after the Joint Resolution and which supposedly support this contention. Although, as will hereafter be shown, the support furnished by these events for this contention is really non-existent, the public importance of the events relied upon is such that an authoritative determination by this Court of their effect is plainly merited.

The first event selected by Farben is a Presidential announcement on April 17, 1953 that there would be no further vesting of German property, 28 Dep't State Bull. 720, 721 (1953). But this announcement was a mere expression of current executive policy and could not, for example, bind future Administrations or even prevent the present Administration from changing this policy if it saw fit to do so.

Farben next cites General License No. 101, June 24, 1953, 8 C.F.R. §511.101 (1958). But the disqualification incident to enemy alien status continued by Con-

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gress is not subject to repeal or amendment by mere executive license, particularly a license issued under the blocking program. That program had nothing whatever to do with the disqualification to sue in American courts, and was never intended to be concerned with that incident of enemy alien status. Furthermore, the regulations under which General License 101 was issued specifically state:

> "The regulations in this part and any rulings, licenses, or instructions issued hereunder shall not be deemed to authorize any transaction prohibited by reason of any other law, proclamation, order or regulation." (U. S. Just. Dep't. Off. Alien Prop., Regs. §511.4 [1948], 8 C.F.R. §511.04 [1958].)

Finally, Farben cites the treaties of 1954 and 1956 between the United States and Germany, 5 U. S. Treaties & Other Intl. Agreements 1939, T.I.A.S. No. 3062 (effective Oct. 22, 1954); 7 U. S. Treaties & Other Intl. Agreements 1839, T.I.A.S. No. 3698 (effective July 14, 1956). But contrary to Farben's position, these treaties have specifically preserved the vesting power. In an exchange of letters (App. 21b-22b) relating to the 1956 Treaty carried on after its execution, the United States and Germany agreed that the United States had reserved all rights which it had under the Bonn Occupation Agreements. In Chapter 6, Article III, Section 1 of the "Convention on the Settlement of Matters Arising Out of the War and Occupation, as Amended" (one of the Bonn Occupation Agreements of 1952) it is specifically recognized that the vesting of German assets might continue after the signing of that Agreement, and the German Federal Republic agreed to raise no objections thereto:

> "The Federal Republic shall in the future raise no objections against the measures which have been

or will be, carried out with regard to German external assets or other property seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany." Conventions on Relations With the Federal Republic of Germany and a Protocol to the North Atlantic Treaty, S. Exec. Q and R, 82d Cong., 1st Sess. 25, 59-60 (1952).

This provision was left unchanged when the Bonn agreements were extensively amended by the "Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany," Oct. 23, 1954, The Bonn Agreements of 1952 as Amended by the Paris Protocol of 1954, S. Doc. No. 11, 84th Cong., 1st Sess. 102 (1955), signed over a year after the alleged surrender of the vesting power by the United States in the 1954 Treaty, and only six days before the signing of the 1956 Treaty.

In view of the far-reaching consequences of a holding that the 1954 and 1956 treaties repeal by implication an explicit preservation of the vesting power contained in the proviso to Joint Resolution 289, no such implied repeal should be found in this case. Repeals by implication are never favored, *Johnson* v. *Browne*, 205 U. S. 309, 321 (1907); *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221-2 (1902). This rule is of even greater force when the subsequent treaty is general in its scope and the prior law is specific, *Washington* v. *Miller*, 235 U. S. 422 (1914); *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497 (1905).

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It must be remembered that the proviso to Joint Resolution 289 was not drafted in a political vacuum. Memories of the bitterness of World War II were more sharply

in force than than now, and the Administration continued to view American assets of German enemies as proper objects of the vesting power. When Congress was asked* to continue the vesting power beyond the termination of a technical state of war, it readily agreed. With respect to those German assets and their preservation pending possible vesting, it was quite appropriate that Congress should accompany that preservation with the exclusion of Germans from our courts insofar as they should be potential parties plaintiff in suits regarding such assets. The language Congress chose to employ to accomplish its goals was so clear that the purpose of that language was unquestioned by any member of Congress.

The result reached by the court below is not a result to be reached by judicial "construction" of inapposite language in an existing statute. It is a result which, assuming it is a proper result, must be reached by Congress.

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* Letter, Harry S. Truman to Alben W. Barkley, July 9, 1951.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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